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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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MAY 24 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Eligibility for the Specialized
Mobile Radio Services and Radio
Services in the 220-222 Mz Land
Mobile Band and Use of Radio
Dispatch Communications

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) GN Docket 94-90
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OPPOSITION TO
PETITION FOR PARTIAL RECONSIDERATION
AND FOR CLARIFICATION

Dated: May 24, 1995

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**OPPOSITION TO PETITION FOR PARTIAL
RECONSIDERATION AND FOR CLARIFICATION**

Vanguard Cellular Systems, Inc. ("Vanguard") respectfully submits this opposition to American Mobile Telecommunications Association, Inc.'s ("AMTA's") Petition for Partial Reconsideration and for Clarification in the above-captioned proceeding ("AMTA Petition"). In its Petition, AMTA challenges the FCC's elimination of its rules prohibiting common carriers from engaging in dispatch services. In support of its Petition, AMTA proposes that the Commission re-allocate "excess" spectrum not currently utilized by cellular licensees to other uses, including dispatch services. As discussed more fully below, AMTA's novel proposal should be rejected because: (1) it would block the robust growth currently underway in small-to-medium cellular markets; (2) it would unfairly favor cellular licensees in large markets which began service earlier than licensees in smaller markets; (3) the proposal would entangle the Commission in unnecessary and time-consuming spectrum re-allocation proceedings; and (4) the proposed re-allocation scheme may not be

implemented without first conducting a separate notice-and-comment rulemaking. Therefore, Vanguard respectfully requests that AMTA's Petition be denied.

BACKGROUND

Vanguard is one of the largest independent operators of cellular telephone systems in the United States. At present, Vanguard serves 26 small-to-medium markets throughout the eastern United States. See Declaration of Richard C. Rowleson, attached hereto as Exhibit A, at ¶ 2. In Vanguard's experience, these markets have been especially attractive because of their potential for substantially increased consumer demand for cellular services.

As a result of Vanguard's intensive capital investments, demand for cellular services in these markets has significantly accelerated in recent years. In 1993, Vanguard had a total of 100,000 customers. Id. at ¶ 3. It took only one year to double that number. Id. Vanguard now has a total of approximately 300,000 subscribers and expects to reach a subscriber base of 400,000 by the end of 1995. Id.

To meet rapidly growing consumer demand, Vanguard expects to add more than 120 new cell sites this year. Id. at ¶ 4. In addition, Vanguard has split existing cells in certain areas to accommodate increasing density of coverage. Id. These and other capital improvements are expected to cost approximately \$150 million for fiscal year 1995. Id.

Vanguard has formulated its plans for expanded coverage based on the expectation that the full amount of spectrum awarded under its respective licenses will be available for the provision of cellular services. Id. at ¶ 5. Unlike licensees in large city markets, providers in small-to-medium markets obtained cellular licenses relatively recently,

and therefore are still in the process of significantly building out their systems. Id. Any re-allocation of currently unused spectrum would effectively prevent Vanguard from expanding its coverage in these markets, and would deprive consumers of the benefits of lower cost and greater availability of advanced cellular communications technologies. Id.

DISCUSSION

In its Petition, AMTA proposes that "spectrum which is not needed to provide a cellular service should be recovered by the Commission and reassigned to whatever party values it most highly as determined by competitive bidding." AMTA Petition at 6.

AMTA's proposal rests upon a fundamental misconception of the spectrum requirements of cellular licensees. As indicated above, Vanguard has been aggressively building out its cellular systems in response to the surge of consumer demand for cellular services in small-to-medium markets. The build-out process was based on the assumption that the full amount of spectrum originally assigned would be available for expansion purposes. It would be ludicrous for the Commission to begin reassigning cellular spectrum precisely at the time when it is most needed by current licensees. Indeed, given the rapid growth in consumer demand, the Commission should be assigning more spectrum for cellular service, not taking away and reassigning spectrum for other uses.

Vanguard's plans for expanding coverage and implementing innovative cellular technologies simply are not feasible if the Commission re-allocates spectrum that originally was designated for the provision of cellular services. Contrary to AMTA's understanding, the market for cellular services does not exist in a dormant, static vacuum whereby "excess" spectrum may be recovered and reassigned. To the contrary, the cellular market is in a state

of dynamic growth that renders the notion of "excess" spectrum meaningless as a practical matter. By necessity, additional spectrum will be needed by Vanguard in the near term to meet future growth demands and expand geographic coverage.

Further, AMTA's re-allocation scheme would have a disproportionately severe effect on subscribers and cellular licensees in small-to-medium markets. Generally, licensing and construction of cellular systems in these markets began at least a few years after the advent of cellular service in the large city markets. Although not all spectrum is currently utilized in every portion of the small-to-medium markets,^{1/} the significant capital expenditures that licensees in the small-to-medium markets have made are just now beginning to reach fruition, as evidenced by the skyrocketing growth in consumer demand. The same is not true of large city markets which were licensed and developed years earlier to serve a larger population and for which licensees consequently utilize much more of the available spectrum. Thus, AMTA's proposal would essentially insulate from potential re-allocation licensees and subscribers in large markets, while cutting off beneficial growth and development of cellular services in small- and medium-sized markets.

AMTA's re-allocation scheme also raises troublesome questions with respect to implementation. The proposal requires that the Commission determine whether there is "excess" spectrum in a particular market. As indicated above, however, there is no easy dividing line between necessary and excess spectrum in a dynamic marketplace. Performing

^{1/} The Commission should take official notice that its cellular technology scheme did not contemplate that all frequency pairs would be utilized in every portion of the licensed market at the same time.

market-by-market determinations of "excess" spectrum to be auctioned therefore would be futile and unnecessarily burdensome, and would waste the Commission's valuable resources.

Finally, any rule adopting AMTA's proposal on reconsideration would run afoul of notice-and-comment requirements. "'As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.'" AFL-CIO v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985) (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)) (emphasis in original). As the Report and Order makes clear, this proceeding concerns the Commission's elimination of common carrier dispatch restrictions, and has nothing to do with the re-allocation of cellular spectrum. See Report and Order, GN Docket No. 94-90, FCC 95-98 (released March 7, 1995). Indeed, the Commission never considered or addressed AMTA's re-allocation scheme in its Report and Order. Further, no notice of proposed rulemaking has ever been issued regarding re-allocation of cellular spectrum. It is therefore apparent that AMTA's re-allocation scheme represents a back-door attempt to challenge the existing licensing framework applicable to cellular licensees. Any such unprecedented departure from the Commission's rules may not be implemented without first conducting a full notice-and-comment rulemaking proceeding. See Donovan, 757 F.2d at 338; Small Refiner Lead, 705 F.2d at 547.

CONCLUSION

For the reasons set forth above, AMTA's Petition for Partial Reconsideration and for Clarification should be denied.

Dated: May 24, 1995

Respectfully submitted,



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EXHIBIT A

DECLARATION OF RICHARD C. ROWLENSON

I, Richard C. Rowlenon, declare under penalty of perjury as follows:

1. I am Senior Vice President and General Counsel to Vanguard Cellular Systems, Inc. ("Vanguard"), headquartered in Greensboro, North Carolina. I have been involved in the cellular industry for more than 10 years.

2. Vanguard provides cellular services in 26 second-tier markets in Pennsylvania, New York, Maine, New Hampshire, West Virginia, Florida, and South Carolina. Generally, these markets were licensed and developed starting approximately one to three years or more after the large metropolitan markets. As a result, the less-populated markets served by Vanguard are currently experiencing rapid, accelerated growth.

3. Vanguard's subscriber base has expanded dramatically in recent years. Specifically, for the eight-year period from 1985 to 1993, Vanguard's customer base grew to 100,000. Only one year later, another 100,000 customers were added. Vanguard presently has a total of approximately 300,000 subscribers and expects to reach a subscriber base of 400,000 by the end of 1995.

4. To accommodate rapidly escalating consumer demand for cellular services, Vanguard expects to make approximately \$150 million in capital expenditures in fiscal year 1995 to increase its geographic coverage and improve network quality and capacity. In particular, more than 120 new cell sites providing mobile voice- and data-grade services are expected to be built this year. Further, Vanguard is in the process of implementing innovative cell-sectoring and cell-splitting technology in its fastest growing

markets. Vanguard is also meeting increasing demand for customer-specific, in-building and on-campus micro-cellular applications.

5. Vanguard's plans for increased coverage and enhanced services are premised upon the continued availability of the full amount of spectrum that the Commission has designated for the provision of cellular services. As indicated above, the markets that Vanguard serves are in a state of dynamic and vibrant growth. By necessity, additional spectrum will be required to meet future growth demands. Re-allocation of cellular frequencies that are not currently utilized by the licensee would surely block the development and expansion of cellular services, and thus would deprive potential and actual customers of the benefits of advanced cellular technologies. In addition, any re-allocation of spectrum would have a disproportionately adverse impact on subscribers and licensees in less-populated areas that were licensed later than the top 50 markets.

The foregoing statement is true and correct to the best of my knowledge and is made under penalty of perjury under the laws of the United States.

DATED this 24th day of May, 1995.

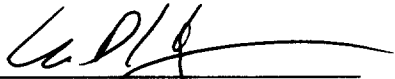
Richard C. Rowlenson

Richard C. Rowlenson

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Petition for Partial Reconsideration and for Clarification were served by first-class mail, postage prepaid, this 24th day of May, 1995 on:

Alan R. Shark
American Mobile Telecommunications
Association, Inc.
1150 18th St., N.W., Suite 250
Washington, D.C. 20036



Lee D. Hwang